In the Supreme Court

OF THE

United States

OCTOBER TERM, 1943

No. 636

JAMES W. BUTLER, MARY L. BUTLER, MARY SEQUIN, CLARA VERSCHOOR, LILLIAN FITZGERALD, DAVID J. LEWIS, ELIZABETH A. LEWIS, JOHN LINGIE SMITH, ELLA RUTH SMITH, PATRICK J. LEONARD, ANNIE LEONARD, STEPHEN C. PERRY, CARLE HILLEBRAND, MRS. C. C. E. HILLEBRAND, FRED HUSSEY, MRS. H. L. GOOCH, OSCAR SWANSON, MARVIN WALTER WAFER, GEORGE W. IRVINE, BETTY DU BOIS, MRS. I. B. BRAWLEY, MARGARET JOHNSTONE, JAMES J. PHELAN, J. H. PEGRAM, MRS. J. H. PEGRAM, MARIE C. KNIEF, AMOS WASHINGTON, DOROTHY LEWITZ, MARIE C. CROSS, VIOLETTE M. CROSS, CHARLES L. FORSEBERG, and MAIDGE MCNAUL, *Respondents,*

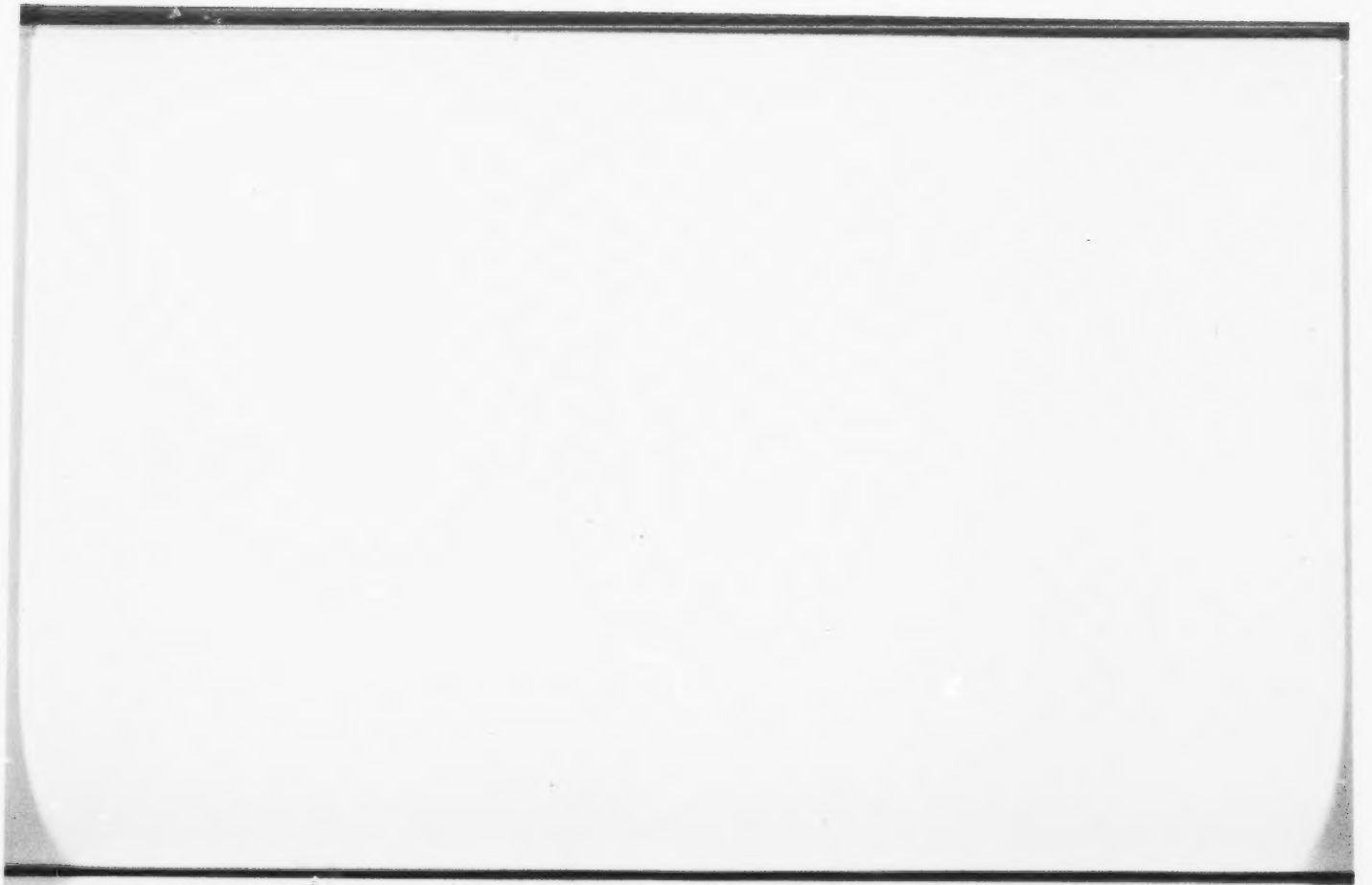
vs.

GRACE APPLETON MCKEY, *Petitioner.*

PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit and BRIEF IN SUPPORT THEREOF.

THEODORE J. ROCHE,
JAMES FARRAHER,
THEODORE H. ROCHE,
Mills Tower, San Francisco, California,
Attorneys for Petitioner.

GEORGE A. STOCKFLETH,
Mills Tower, San Francisco, California,
Of Counsel.



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vs.

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Petitioner.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioner, Grace Appleton McKey, respectfully shows that:

Rule 4 (d) of the "Federal Rules of Civil Procedure for the District Courts of the United States" which prescribes the manner of serving a summons in a case before a District Court (after providing for personal services on defendants falling into various classifications), declares under subdivision "7" thereof, that as to individuals or corporations,

> "it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the State in which service is made for the service of summons or other like process upon any such defendant in an action brought in the Courts of general jurisdiction."
>
> (28 U. S. C. A. Sec. 723 (c), p. 383.)

There is no federal statute providing for service upon defendants who cannot be found within the district or state in which the action is filed. Appellees therefore, under the authority of the above quoted rule, sought to secure service by publication under Section 412 of the *Code of Civil Procedure of California,* the pertinent portions of which reads as follows:

> "Where the person on whom service is to be made resides out of the State; * * * cannot,

after due diligence, be found within the State; or conceals himself to avoid the service of summons; * * * and the fact appears by affidavit to the satisfaction of the court, or a judge or justice thereof; * * * such court, judge, or justice, may make an order that the service be made by the publication of the summons; provided, that where service is sought to be made upon a person by publication upon the ground that he cannot, after due diligence, be found, within the State, it must first appear by the affidavit aforesaid that there has not been filed, on behalf of such person, either in the county in which such action was brought, or in the county in which such action is pending, the certificate of residence provided for by section 1163 of the Civil Code; or that said certificate was so filed and that the defendant cannot be found at the place named in said certificate, which latter fact must be made to appear by the certificate, of the sheriff, or a constable or marshal, of the county wherein said defendant claims residence in and by said certificate of residence, * * *."

This petition is concerned with the interpretation of the word "affidavit" which appears in several places in the code section last quoted. Petitioner contends that it is the law of California, as fixed by the decisions of the highest Courts of California, that the filing of an "affidavit", *based upon hearsay,* is not a compliance with the code section. The Circuit Court of Appeals in this case holds to the contrary, hence this petition.

SUMMARY OF POINTS INVOLVED.

The action is a stockholders' liability suit, growing out of the failure of an Illinois bank in June 1932. (R. 8.) It was filed in the United States District Court in California on November 19, 1936 (R. 31), more than four years after the liability accrued through the bank failure.

Since federal Courts follow the state statute of limitations (*Benedict v. New York,* 250 U. S. 321, at 327) and the action was brought in California, the law of this state is applicable. The action is either one on contract (as claimed in respondents' complaint, R. 19) or one upon statute. The California statute of limitations prescribes a period of four (4) years in which actions on written contracts must be instituted (Sec. 337, Code of Civil Procedure of California), and a period of 3 years in which an "action upon a liability created by statute, other than a penalty or forfeiture," can be commenced. (Sec. 338 (1) of the same Code.) Respondents' cause of action therefore was outlawed.

On January 16, 1939, respondents presented to the judge of the District Court an "affidavit for Order for Publication" (R. 46) and moved for and secured from the District Judge, forthwith, an "order for Publication of Summons" (R. 60), which directed publication in a legal journal. (R. 61, 70.)

On April 18, 1939, following publication of the summons the Clerk of the District Court signed and entered "Judgment by Default of Clerk," in the sum of $110,886.63 plus costs. (R. 67.) Petitioner

first learned of the fact that judgment had been taken against her about June 15, 1942. (R. 76.) Had she been served she could have secured a dismissal on the ground of the outlawry of the claim.

On July 23, 1942, petitioner moved the District Court for an order quashing the service of summons upon the ground, among others, that

> "the order * * * directing publication of summons * * * does not comply with Sec. 412 of the Code of Civil Procedure * * * in that the alleged facts in the affidavit of Fred S. Herrington upon which the order is based, are predicated not on the affiant's knowledge, but upon hearsay." (R. 70.)

Accompanying the moving papers was a memorandum of authorities, which included three California decisions declaring orders based upon hearsay affidavits to be void. (R. 73, 74.)

On December 5, 1942, the Judge of the District Court made an order quashing the service of summons and vacating the said default judgment. (R. 91, 92.)

THE POINT WAS PRESENTED TO THE CIRCUIT COURT OF APPEALS.

The Court of Appeals, after stating the question before it in the following language:

> "In 1942, more than three years after entry of judgment, appellee moved the court to quash service of summons setting up as one ground that the court had no jurisdiction to order the

> publication of summons as the affidavit upon which the order was based contained facts predicated upon hearsay. The court granted the motion and vacated the default judgment. At the same time it denied appellee's motion to dismiss and appellants' motion to file additional affidavits concerning the attempted service. Appellants appeal from the order of the district court except insofar as it denies the motion to dismiss the action." (R. 110, 111.)

proceeds to decide the question whether a hearsay or "information and belief" affidavit is sufficient under California law, upon which to base an order for publication of summons. (R. 111, 112; 138 Fed. (2d) 375.)

The Court of Appeals reversed the District Court, holding that under California law an order based upon a hearsay affidavit was sufficient, saying:

> "It seems evident that in California an affidavit based on information and belief would support an order for publication of summons. Two California Supreme Court decisions very definitely hold that the hearsay nature of facts stated in an affidavit may be considered by the judge in drawing his conclusion as to due diligence, but that such a hearsay affidavit does not automatically render the judgment void. Rue v. Quinn, 137 Cal. 651; Ligare v. California Southern Rr. Co., 76 Cal. 610. *Directly contra to this principle is Kahn v. Matthai, 115 Cal. 689, and perhaps Columbia Screw Co. v. Warner Lock Co., 138 Cal. 445.*" (R. 112.) (The language emphasized was later eliminated as stated below, and therefore is not in the Record.)

On petition for rehearing petitioner herein called to the attention of the Court of Appeals the fact that the California cases cited in the above-quoted portion of the opinion, as "perhaps" holding that a judgment based upon a hearsay affidavit would be void, were later in point of time than the decisions in *Rue v. Quinn* and *Ligare v. California Southern Rr. Co.*, relied on by the Court. A rehearing was denied, but the Court modified the judgment by adding a paragraph to the effect that the said later decision did not hold that such an order was void, but only that it was void under a direct attack. (R. 112, 113; 138 Fed. (2d) 373 at 376, Syl. 6.)

It would be strange, indeed, if a person who *appeared* in a case, in which judgment went against her, could by appeal attack a default judgment on the ground that the affidavit was hearsay, but one who was served by publication and who did not discover the existence of the judgment until long after the appeal period had passed, could not attack the judgment on that ground.

THE DECISION OF THE CIRCUIT COURT AS TO CALIFORNIA LAW ON THE SUBJECT IS DIRECTLY CONTRARY TO THE DECISIONS OF THE CALIFORNIA COURTS.

The Court of Appeals, relying on *Galpin v. Page*, 85 U. S. 350, and *Braly v. Seaman*, 30 Cal. 610, correctly holds that a statute such as the one under interpretation must be *strictly* construed (R. 112), and it likewise correctly declares that:

> "it is a basic rule that a judgment is void and subject to collateral attack if a lack of jurisdiction in the Court appears on the face of the record." (R. 112.)

In the latest California decision, cited in the opinion, namely, *Columbia Screw Co. v. Warner Lock Co.,* 138 Cal. 445, the California Supreme Court was considering the sufficiency of an affidavit based upon hearsay and it was called upon to determine whether such an affidavit could, under Section 412 of the California Code of Civil Procedure, give the trial Court jurisdiction to make an order for publication of summons—the identical point involved in the case at bar. The Court, after declaring that

> "when the statute uses the words 'appear by affidavit' it means more than an affidavit as to what some one told the party making the affidavit",

held that the "order being void, the attempted service by publication is void" (p. 447), and that the Court not having acquired jurisdiction of the defendant could not enforce the judgment in any manner. (p. 448.)

In *Kahn v. Matthai,* 115 Cal. 689, the affidavit for the order of publication contained facts reported to affiant by five process servers or investigators hired to search for and serve the defendant. The California Supreme Court held that:

> "the affidavit was insufficient to uphold the order of publication of summons and hence that the court below failed to obtain jurisdiction of the person of the defendant." (p. 693.)

That decision calls attention to the fact that under Section 670 of the California Code of Civil Procedure, since 1895, the affidavit for publication and the order for publication of summons constitute a part of the judgment roll. Therefore if an affidavit is hearsay, the defect appears on the face of the judgment roll.

The following cases hold that where the lack of jurisdiction of the person appears on the face of the record, the resultant judgment is an absolute nullity.

Earle v. McVeigh, 91 U. S. 503;
Thompson v. Whitman, 18 Wall. 457;
Harris v. Hardeman, 14 How. 334.

THE PETITION IS IN TIME.

The decision of the Circuit Court of Appeals in this case was rendered on September 8, 1943. The Court denied a rehearing on November 3, 1943, thus giving finality to the judgment as of that date.

THIS COURT'S JURISDICTION TO HEAR PETITION.

This Court's jurisdiction to hear and determine this petition is found in Rule 35, subd. 5(b), which provides for review on certiorari, where

> "A Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions."

That there is involved here an important question of local law is evidenced by the following facts:

Section 413 of the *Code of Civil Procedure of California* provides, with reference to the place of publication of a summons, as follows:

> "The Order must direct the publication to be made in a newspaper, to be named and designated as most likely to give notice to the person to be served. * * *"

It is a universal custom among trial Courts to order publication in the local legal newspaper, as was done in the present case. (R. 61, 70.) Of course, a legal newspaper is not one "most likely to give notice". On the contrary, it is a very safe place to hide the publication from the person to be served. It is a safe thing to say, that no one but the newspaper proof reader and an occasional representative of a credit association ever reads the summons published in a legal newspaper.

The power of this Court to exercise jurisdiction of this petition is found in Section 240 (a) of the Judicial Code, as amended. 28 U. S. C. A. 347(a).

CONCLUSION.

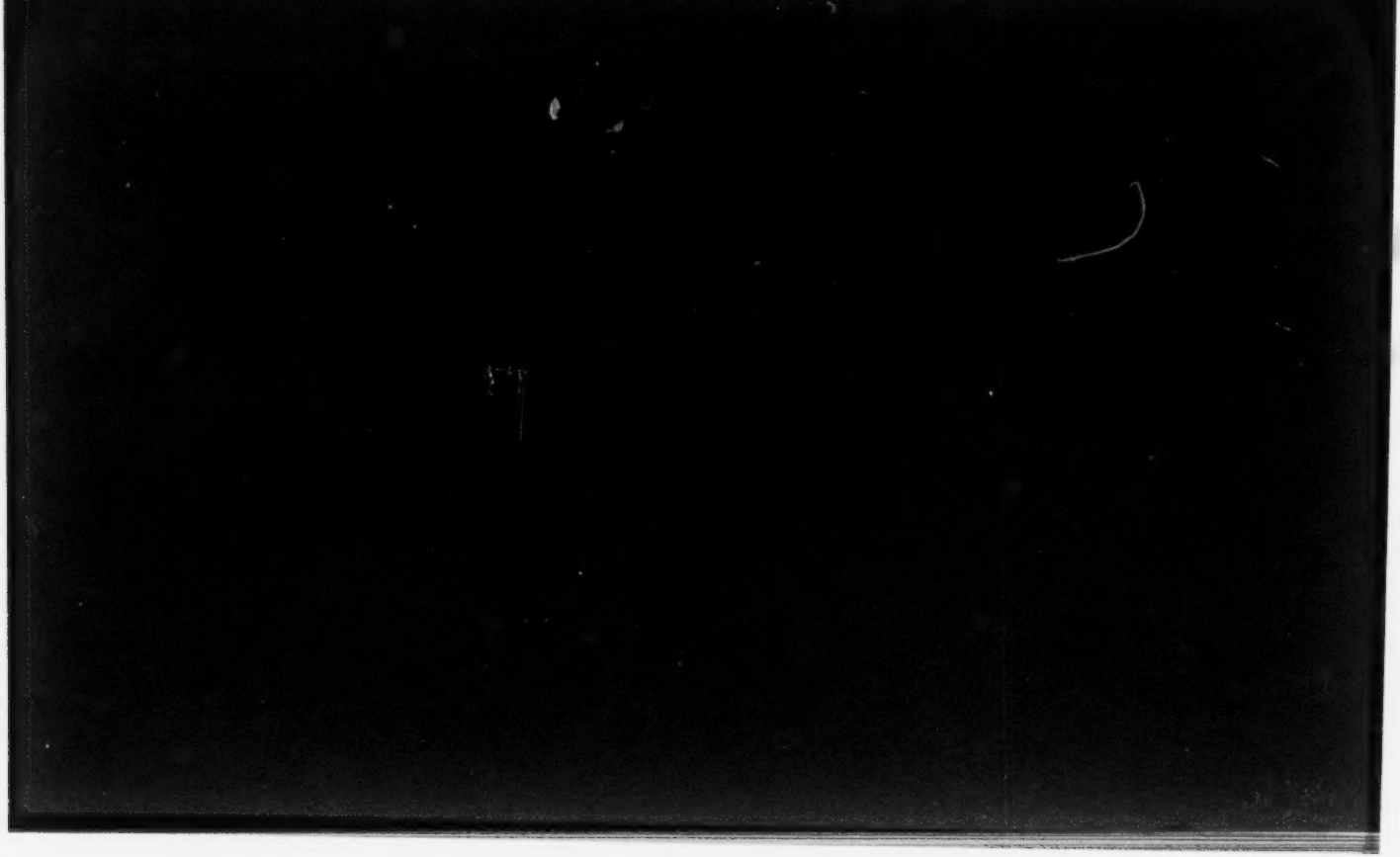
If the decision of the Circuit Court of Appeals is permitted to stand, District Courts situated in California will be induced by its precedent to give validity to judgments, the existence of which was not even suspected by the judgment debtors, and to do so under a misapprehension of California law, in a matter in which California law is declared to apply.

The granting of the writ and the reversal of the Court of Appeals' decision would correct the error, re-establish the proper precedent, and relieve petitioner from the burden of a judgment which should never have been rendered against her.

Dated, San Francisco, California,
January 24, 1944.

Respectfully submitted,
THEODORE J. ROCHE,
JAMES FARRAHER,
THEODORE H. ROCHE,
Attorneys for Petitioner.

GEORGE A. STOCKFLETH,
Of Counsel.



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Respondents,

vs.

GRACE APPLETON MCKEY,

Petitioner.

BRIEF IN SUPPORT OF PETITION.

THE FACTS.

The default judgment in this case was predicated upon a service by publication, in the manner provided for in Section 412 of the California Code of Civil Procedure.

The question before the District Court and before the Circuit Court of Appeals, was whether the affidavit of one Fred S. Herrington, was a sufficient base for the order for publication, so that by publication jurisdiction was obtained against petitioner herein.

As we have shown in the petition (p. 2), Rule 4 (d) of "Federal Rules of Civil Procedure" provides that service by publication shall be made "in the manner prescribed by any statute of the United States or in the manner prescribed by the laws *of the state in which service is made.*" 20 U. S. C. A. 383.

Since there is no federal statute for service by publication, on one who cannot be found within the state, California law applies in the present instance, as the Court of Appeals concedes in its opinion.

Section 412 of the *Code of Civil Procedure* requires that before an order for publication can be lawfully made, the fact that the defendant cannot be found within the state or is secreting him or herself, must appear by "affidavit", and it *must* also appear by *affidavit* that

> "there has not been filed, on behalf of such person (the defendant) * * * either in the County in which such action was brought, or in the County in which such action is pending, the cer-

> tificate of residence provided for by Section 1163 of the Civil Code * * *."

Herrington's affidavit (the only affidavit filed) upon which the order for publication was based, recites that he had sent the summons to the U. S. Marshal and relates what the Marshal reported back, and that he had sent an alias summons to a process server in Los Angeles, California, and what the process server wrote to affiant with reference to his purported attempts to serve defendant—and winds up with the conclusion that the defendant (petitioner herein) was avoiding service and could not be found in California. (R. 46.)

The *affidavit,* in a futile effort to comply with the last above quoted provision of Section 412, states:

> "that affiant is *informed and believes* and therefore alleges the fact to be that there has not been filed by said defendant, or on her behalf, in the City and County of San Francisco, State of California, where said action was brought and is pending, a certificate of residence as provided for in Section 1163 of the Civil Code of California." (R. 57.)

It will thus be seen that whether the trial Court acquired jurisdiction over petitioner herein depends upon whether under California law jurisdiction is obtained of the person of the defendant where the affidavit upon which the order for publication of summons is based, is one of hearsay.

COURT OF APPEALS' DECISION.

The Circuit Court of Appeals' opinion says that under California law an order for publication of summons, based upon hearsay, is bad against a direct attack, but invulnerable to a collateral attack (R. 112), and that while petitioner's attack on the judgment "is a direct attack" it was made after the time for appeal had expired (because perchance petitioner did not know of the existence of the judgment until after the appeal period had long expired), and therefore "must be considered under the principles applicable to a collateral attack". (R. 112.)

CALIFORNIA DECISIONS CONTRARY TO COURT OF APPEALS' DECISION.

The Supreme Court of California in *Kahn v. Matthai,* 115 Cal. 689, at 693, held that an affidavit which recited efforts of 5 different persons (other than affiant) to locate and serve defendants, was not an "affidavit", as meant in Section 412 of the Code of Civil Procedure, and

> "hence that the Court below failed to obtain jurisdiction of the person of the defendant."

In the case of *In re Behymer,* 130 Cal. App. 200 (1933), one of California's District Courts of Appeal held that an affidavit reciting the efforts of someone else to locate and serve a defendant was insufficient upon which to base a substituted or published service, and that the judgment based upon such a service was *"void"* and that the Court could "at any time properly set it aside", saying:

> "a judgment or order void on its face may be vacated on motion at any time, or the Court may on its own motion, set it aside or disregard it, regardless of how the invalidity is brought to its attention; a judgment or order is said to be void on its face, when the invalidity is apparent upon an inspection of the judgment roll."

In *Columbia Screw v. Warren Lock Co.*, 138 Cal. 445 (cited by us in the petition), the Supreme Court, after commenting that when the statute uses the word "affidavit", in Section 412, "it means more than an affidavit as to what some one told the party making the affidavit", held that an order based upon such an affidavit is void, and that therefore jurisdiction was never obtained over the defendant and the judgment "should not be enforced in any manner". (449)

CASES RELIED UPON IN OPINION DO NOT SUPPORT COURT OF APPEALS' OPINION THAT THE AFFIDAVIT IS SUFFICIENT.

In *Rue v. Quinn*, 137 Cal. 651 (1902) (cited in Court of Appeals' opinion, R. 112), the affidavit was only partly hearsay—the remainder of the judgment showed a personal search by the affiant. In that case the Court held that,

> "A motion to set aside a judgment upon the ground that it appears upon the face of the judgment record that the Court had no jurisdiction of the person of the defendant is a direct attack upon the judgment and is not barred by mere lapse of time." (p. 654.)

Furthermore, that Court held that if the defect appeared on the face of the judgment roll, it did not make any difference whether the attack was direct or collateral. (654) In the case at bar, since Section 412 of the California Code of Civil Procedure makes the proof by affidavit essential, and since Section 670 of the same code requires the affidavit to be a part of the judgment roll, the attack, even if collateral, stands on an even footing with a direct attack.

In *Ligare v. California R. R. Co.,* 76 Cal. 610 (1888) (see Court of Appeals' decision, R. 112), the affidavit was not attacked on the ground of hearsay, but the Court passed on the question whether the degree of diligence shown was sufficient. The Court held that the affidavit was probably insufficient on appeal, but was good on collateral attack. The attack in that case was a true collateral attack upon a judgment, when its use was sought in another case.

THE COURT OF APPEALS MISINTERPRETS CALIFORNIA LAW IN DECLARING THAT AN ORDER BASED UPON A HEARSAY AFFIDAVIT IS VOID UNDER DIRECT ATTACK AND VALID UNDER COLLATERAL ATTACK.

The reasoning of the Court below is incomprehensible to us. We respectfully believe that it was misled into error by selecting sentences from several decisions and lifting them out of their text and applying them in a sense not contemplated by the authors of the opinions.

Before petitioner petitioned the Court of Appeals for a rehearing, that Court's finding on the question involved read as follows:

> "It seems evident that in California an affidavit based on information and belief would support an order for publication of summons. Two California Supreme Court decisions very definitely hold that the hearsay nature of facts stated in an affidavit may be considered by the judge in drawing his conclusion as to due diligence, but that such a hearsay affidavit does not automatically render the judgment void. Rue v. Quinn, 137 Cal. 651; Ligare v. California Southern Rr. Co., 76 Cal. 610. Directly contra to this principle is Kahn v. Matthai, 115 Cal. 689, and perhaps Columbia Screw Co. v. Warner Lock Co., 138 Cal. 445."

On the petition for rehearing we called to the Court's attention the fact that *Columbia Screw Co. v. Warner Lock Co.*, 138 Cal. 445, which the Court said was "perhaps" directly contrary to the "principle" it was adopting, was rendered later in point of time than the latest case the Court was relying on, namely *Rue v. Quinn*, 137 Cal. 651, and therefore was the law of California on the point.

The Court denied a rehearing but modified the judgment by striking out the words "and perhaps, Columbia Screw Co. v. Warner Lock Co.", and substituting the following:

> "* * * Columbia Screw Co. v. Warner Lock Co., 138 Cal. 445, held on direct appeal that a judgment based upon hearsay statements in the affidavit for the publication of summons could

> be set aside. It does not overrule Rue v. Quinn, supra, holding that on similar facts such a judgment could not be set aside on collateral attack. * * *" (R. 113.)

(N. B. We cannot give Record references to the above quoted portion of the opinion as it read before its amendment by the Court, for the reason that we have been advised that the record must contain only the decision as modified, after hearing of petition on rehearing.)

It will be observed that in the forepart of the quoted language, the Court limited its holding to cases in which the attack on the judgment is *"collateral"*.

Later in the opinion, the Court of Appeals says:

> "The California cases support the conclusion that on a direct appeal from a judgment an affidavit based upon hearsay *will be found fatally defective* and the judgment will be ordered reversed." (Emphasis ours.)

We believe we can demonstrate that the California Courts make no such distinction, where the fact to be established by the affidavit is shown *by hearsay only*. But before going to the cases, we feel impelled to attack such a statement as being entirely beyond the realm of reasonable justice.

Necessarily the only cases in which an affidavit for publication of summons are ever considered is where the publication is followed by a default judgment. Whether the defendant can appeal from the default judgment depends on whether he discovers the fact

that the judgment has been taken against him or her in time to take an appeal. If he discovers on time and appeals, under the rule of the Court of Appeals (and under the law of California), on such appeal the judgment will be held void. But if (according to the Court of Appeals and not according to California law) the defendant doesn't discover that judgment has been rendered against him until after the appeal period has past, and by necessity attacks the judgment in the manner followed in the case (which is in fact a *direct attack* as the Court concedes (R. 112)) the judgment will be valid.

The Court of Appeals cites *Forbes v. Hyde,* 31 Cal. 342, 348, as California authority for the distinction, but the California Supreme Court drew no such distinction in that case. In that case there was involved a true collateral attack upon a default judgment, for it was made by a stranger to the judgment and in another action. Section 412 of the California Code of Civil Procedure requires of an affidavit for publication of summons that it show that "a cause of action exists against a defendant". The affidavit of the plaintiff in the *Forbes* case recited on the point, that

> "he has a good cause of action, and that he is a necessary and proper party defendant thereto, as he verily believes." (353)

The Supreme Court of California held in that case that this was not a statement of fact, not "legal" evidence, and that the default judgment entered in the case was *absolutely void.* (353, 355.)

If one reads the Court of Appeals' quotation from the decision in the *Forbes* case (supra) (see opinion, R. 113, 114), in the light of the foregoing, he will discover that when the Court in that case used the words "legal evidence", it meant something other than hearsay.

And in that case the Court said the following with reference to the right of appeal, which the Court of Appeals says must be exercised to avoid a default judgment, where the affidavit for publication is hearsay:

> "An appeal is no adequate remedy where a party has no notice, for the time to appeal is very brief and may expire before actual notice is obtained. In the language of the Court in Smith v. Rice, 11 Mass. 512, 'the very grievance complained of is that the party had no notice of the pending of the cause, and of course no opportunity to appeal.' (See, also, Bloom v. Burdick, 1 Hill. 142.)"

And what is more significant is that the Court in *Forbes v. Hyde* very clearly showed that when speaking of collateral attack, it was not referring to motions such as this, because it said at one point in its opinion:

> "But as there was jurisdiction to act until reversed, or attacked by *some direct proceeding to annul it,* the order and judgment based upon it would be valid." (31 Cal. 348.) (Emphasis ours.)

Incidentally this short sentence was supplanted by three asterisks in the long quotation from that deci-

sion, in the Court of Appeals' decision in the present case. *Ligare v. California R. R. Co.,* 76 Cal. 710, was likewise cited in the Court of Appeals' decision (R. 114) on this point. It was a true collateral attack, being made by one not a party to the judgment and in another action. It adopts the language just above quoted from the *Forbes v. Hyde* opinion.

So no case cited in the Court of Appeals' opinion supports its contention that there is any difference under California law between attacking a default judgment on appeal and on motion to set it aside, where the defect is apparent from an examination of the judgment roll.

It is true that in *City of Salinas v. Lee,* 217 Cal. 252, the California Supreme Court held that where a motion to set aside a default judgment is made after the time for appealing has expired, it is the equivalent of a collateral attack, and to invalidate a judgment at that late date one must be able to direct attention to a defect appearing on the face of the judgment roll. Here the fact that the affidavit is required by the California Code section, and is made a part of the judgment roll, makes that distinction immaterial.

CONCLUSION.

We respectfully submit that the Circuit Court of Appeals in its decision, ignored the plain import of the pertinent California statute, and has misinterpreted the effect of the decisions of the California

Courts, in a matter of very considerable importance to the residents of California.

Dated, San Francisco, California,
January 24, 1944.

THEODORE J. ROCHE,
JAMES FARRAHER,
THEODORE H. ROCHE,
Attorneys for Petitioner.

GEORGE A. STOCKFLETH,
Of Counsel.

Due service and receipt of a copy of the within is hereby admitted

this..... day of January, 1911.

.....

Attorneys for Respondents.

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GRACE APPLETON MCKEY, *Petitioner.*

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

JOHN W. DINKELSPIEL,
333 Montgomery Street, San Francisco, California,
Attorney for Respondents.

DINKELSPIEL & DINKELSPIEL,
333 Montgomery Street, San Francisco, California,
Of Counsel.

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OCTOBER TERM, 1943

No. 636

JAMES W. BUTLER, MARY L. BUTLER, MARY SEQUIN, CLARA VERSCHOOR, LILLIAN FITZGERALD, DAVID J. LEWIS, ELIZABETH A. LEWIS, JOHN LINGIE SMITH, ELLA RUTH SMITH, PATRICK J. LEONARD, ANNIE LEONARD, STEPHEN C. PERRY, CARLE HILLEBRAND, MRS. C. C. E. HILLEBRAND, FRED HUSSEY, MRS. H. L. GOOCH, OSCAR SWANSON, MARVIN WALTER WAFER, GEORGE W. IRVINE, BETTY DU BOIS, MRS. I. B. BRAWLEY, MARGARET JOHNSTONE, JAMES J. PHELAN, J. H. PEGRAM, MRS. J. H. PEGRAM, MARIE C. KNIEF, AMOS WASHINGTON, DOROTHY LEWITZ, MARIE C. CROSS, VIOLETTE M. CROSS, CHARLES L. FORSEBERG, and MADGE MCNAUL, *Respondents,*

vs.

GRACE APPLETON MCKEY, *Petitioner.*

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

I.

PETITIONER'S RELIANCE ON CALIFORNIA DECISIONS EXAMINING AFFIDAVITS FOR PUBLICATION OF SERVICE UPON "DIRECT ATTACK ON APPEAL" IS INCONSISTENT WITH HER CONTENTION BELOW THAT THIS JUDGMENT IS A NULLITY AND WITH THE FACT THAT NOT EVEN IN HER PRESENT PETITION DOES SHE IMPEACH THE DECISION OF THE CIRCUIT COURT OF APPEALS UPON THE GROUND THAT THE COURT ERRED IN APPLYING THE RULES APPLICABLE TO "COLLATERAL ATTACK".

Petitioner's motion to set aside the judgment entered by the clerk of the United States District Court on April 18, 1939, was filed more than three years after such entry of judgment, to wit, on July 23, 1942. At this time petitioner had no statutory remedy against the judgment, her motion could therefore succeed only if the judgment was void for lack of jurisdiction and could therefore be disregarded as a nullity by the court on its own motion.

Washko v. Stewart, 44 Cal. App. (2d) 311;
Smith v. Jones, 174 Cal. 513;
City of Salinas v. Lee, 217 Cal. 252.

In answer to respondents' argument that petitioner's motion was made after the time allowed for impeaching errors of the court, petitioner made it clear that she would stand or fall upon her contention that the judgment was void and could be disregarded by the court on its own motion. Petitioner stated her theory in the Circuit Court of Appeals as follows:

> "An adequate answer to appellants' argument is that the judgment being a void one, the court had power to set it aside on its own motion, without any intervention by appellee." (Appellee's brief in the Circuit Court of Appeals on page 3.)

In her brief to this court petitioner claims that her attack on the judgment should be treated more favorably than "a true collateral attack, being made by one not a party to the judgment and in another action" (first paragraph on page 23 of petitioner's brief).

Since petitioner, on account of the time element involved, must necessarily rely on her claim that the judgment was a nullity, she cannot at the same time contend that rules other than those applicable to a "true" collateral attack should be applied to her attack on the judgment.

The Circuit Court of Appeals has cited the recent case of *City of Salinas v. Lee,* supra, as California authority that a motion to set aside a judgment made after expiration of the time for direct appeal can be successful only if the judgment is void and subject to collateral attack, but that the discretion of the trial court will remain undisturbed. This doctrine (although not always recognized in earlier California cases) has consistently been followed in California since *People v. Norris,* 144 Cal. 422, 424. The development of the California law on this doctrine is summed up in 15 California Jurisprudence 47, Section 139, which summary of the law was cited with approval by the California Supreme Court in the *Salinas* case at page 256.

This doctrine of the California law is in harmony with the principle expressed by this court in *Matton S. B. Co. v. Murphy,* 319 U.S. 412, 415, and reiterated in this term by Mr. Chief Justice Stone in his dissent in *Hill v. Hawes,* 88 L. ed. Adv. Ops. 213, 216, to the effect that it is in the public interest, and it is the very purpose of limiting the period for appeal, to set a definite and ascertainable point of time when litigation shall be at an end unless within that time application for appeal has been made; and if it has not, to advise prospective appellees that they are freed of the appellants' demands.

Apart from the fact that petitioner's reliance on California decisions involving direct attack on a judgment is inconsistent with her own theory, she is precluded from raising this point because she cannot in a petition for writ of certiorari seek review on points which were not urged by her in the Circuit Court of Appeals; and she cannot in her brief rely on decisions covering points which are not properly presented in the petition.

Sonzinsky v. United States, 300 U.S. 506;
Helis v. Ward, 308 U.S. 365, 370;
Dickinson Industrial Site v. Cowan, 309 U.S. 382, 389.

II.

THE JUDGMENT IS NOT VOID AND SUBJECT TO COLLATERAL ATTACK UNDER CALIFORNIA LAW REGARDLESS OF THE HEARSAY FEATURES IN THE AFFIDAVIT FOR PUBLICATION OF SERVICE.

The Circuit Court of Appeals for the Ninth Circuit has correctly held in this case that the hearsay nature of facts stated in an affidavit for publication of service may be considered by the judge in drawing his conclusion as to due diligence, and that under California law such a hearsay affidavit does not automatically make the judgment void against collateral attack. The court based this holding entirely on California precedent. Since the Appellate Court's decision is in itself high authority on California law, we do not anticipate that the Appellate Court's ruling on California law will be disturbed. Nevertheless, we will answer petitioner's arguments as follows:

Petitioner claims that the California cases of *Kahn v. Matthai,* 115 Cal. 689; *In re Behymer,* 130 Cal. App. 200; *Columbia Screw Co. v. Warner Lock Co.,* 138 Cal. 445, are contrary to the holding of the Court of Appeals. Each of these decisions was cited by the Court of Appeals which held that two of these cases, to wit: *Kahn v. Matthai,* supra, and *Columbia Screw Co. v. Warner Lock Co.,* supra, were concerned with a review of a judgment on "direct appeal" and that, therefore, the examination of the trial court's discretion in passing on affidavits for the publication of summons in those cases does not furnish a precedent as to the question of whether a judgment based upon a hearsay affidavit for publication of summons is void

upon "collateral attack". The petitioner makes much of the fact that the Appellate Court in the original wording of its opinion had said that the *Columbia Screw* case was "perhaps" contrary to the principle, applicable on collateral attack, that the hearsay nature of an affidavit does not affect the judgment based thereon, but that upon petition for rehearing the opinion was amended, so as to eliminate the word "perhaps". No weight can be accorded to this change in the wording of the opinion, because the Appellate Court clearly states that the California cases support the conclusion that a hearsay affidavit which may be held fatally defective on "direct appeal", will not render the judgment void on "collateral attack". The California Supreme Court in *Rue v. Quinn*, 137 Cal. 651, a case involving a collateral attack, clearly distinguished on this very ground, the earlier case of *Kahn v. Matthai*. The same distinction appears in the *Columbia Screw* case which was decided shortly after *Rue v. Quinn*. But the *Kahn* case and the *Columbia Screw* case are distinguishable from each other in that in the latter case the affidavit was not only a hearsay affidavit, but did not even contain an affirmation by the affiant that he believed the information obtained to be true. This lack of expression of the affiant's belief as to the truth of the information left it open whether he had other information contrary to that which was stated in this affidavit, so that the affidavit could not be considered one based on information and belief. This feature of the affidavit in the *Columbia Screw* case makes it one *sui generis*.

Since the *Kahn* case and the *Columbia Screw* case do not support petitioner's contention as to the nullity of the judgment, there remains only the case of *In re Behymer,* supra, where one of California's District Courts of Appeal cited and followed the decision of the Supreme Court of the State in the case of *Kahn v. Matthai,* supra, without noticing that said case according to *Rue v. Quinn,* supra, was authority only on "direct attack". The fact that the District Court of Appeal in the *Behymer* case relies solely on *Kahn v. Matthai* without even referring to the *later* Supreme Court case of *Rue v. Quinn,* deprives the *Behymer* case of any weight as authority as was recognized by the Circuit Court of Appeals in its decision.

The Circuit Court of Appeals in its citation of California cases refers to the early case of *Forbes v. Hyde,* 31 Cal. 342, wherein a marked distinction was drawn between an affidavit clearly of a character too unsatisfactory to justify an order for publication of summons based upon it and therefore subject to a direct attack on the judgment, and an affidavit which presents no evidence at all tending to prove the essential fact which might render the judgment void upon collateral attack. In fact, the rule in this case is identical with the doctrine approved by the United States Supreme Court in *Thompson v. Thompson,* 226 U.S. 551, to the effect that the material facts must be stated in the affidavit, but that defects in the mode of stating them or as to the degree of proof will not render the judgment void on collateral attack.

In *Rue v. Quinn,* supra, the court had before it as in the instant case a motion which was not made until

after the time for an appeal from the judgment had expired, and on this fact the court based its holding that it would not examine defects in the affidavit for publication of summons in the same manner as it did in the case of *Kahn v. Matthai,* supra. It is, therefore, a misleading citation from the *Rue* case in petitioner's brief in support of her petition at the bottom of page 17, where a sentence from the court's decision is printed from which it is made to appear that the court held that a motion to set aside the judgment made at such time was a direct attack. We refer to the court's statement at page 656 of the official California Reports which we have quoted on page 37 of our opening brief in the Court of Appeals, from which it clearly appears that a motion such as this made after the expiration of the time allowed for appeal was treated by the court according to the rules governing a collateral attack.

In *Ligare v. California R. R. Co.,* 76 Cal. 610, the same distinction between the examination of an affidavit on "direct" and "collateral attack" was drawn by the court. The affidavit was held sufficient on collateral attack. That the attack in that case was a "true" collateral attack is immaterial because a motion to vacate the judgment made after the statutory time is governed by the same rules as a collateral attack. In appellants' opening brief in the Appellate Court on page 36 a passage from page 612 of the *Ligare* case was cited from which passage it may be noted that the affidavit upheld in the *Ligare* case was very similar to the affidavit in the instant case in that the affiant stated that he had made inquiry of all per-

sons from whom he could expect to obtain information as to the residence of said defendant and that the affiant likewise stated that he had placed a summons and alias summons in the hands of various sheriffs with instructions to make service, but that said summonses had been returned to him because the sheriffs had not been able to effect service thereof. The main weakness of the affidavit in the *Ligare* case was that the affiant had omitted to state that upon his inquiries as to the residence of the defendant he had received no information placing him in a position to find the defendant within the state. This weakness of the Ligare affidavit is not matched by any defect of the present affidavit, wherein the same affirmation was made as to the inquiries made by the affiant and his associates but wherein it was also expressly stated as a fact within affiant's knowledge that neither he nor his associates knew the present whereabouts of said defendant and could not learn her present whereabouts. Consequently, even if all statements of facts which were made on hearsay are disregarded, the present affidavit is still more complete than the affidavit which was upheld in the *Ligare* case to which the Court of Appeals has compared it because of the similarity of both affidavits in certain respects.

In the case of *City of Salinas v. Lee*, supra, the affidavit involved was not the affidavit for publication of service, but the affidavit of publication wherein it was erroneously stated that summons had been published for one month instead of the two-month period required by law. Both of these affidavits are required by law and petitioner's insinuation on page 23 of

her brief in support of the petition that only the affidavit for publication is part of the judgment roll is erroneous; see page 254 of the *Salinas* case where the court states that the affidavit of publication "of course, constitutes a part of the judgment roll". In that recent California Supreme Court decision it is said that even a misstatement of material facts in an affidavit for publication of service does not make the judgment void on "collateral" attack. The California Supreme Court discussed the question of what defects appearing in the judgment roll make a judgment void on its face. The court states that under California law every presumption is in favor of the validity of the judgment, and consequently accords weight to the jurisdictional recital in the judgment which constitutes part of the judgment roll. In the instant case, as stated by the Circuit Court of Appeals, the judgment contained the recital that the defendant Grace Appleton McKey had "been duly and regularly served with summons", and the order of publication of summons which is also part of the judgment roll recited diligent search for said defendant, and that after due diligence she could not be found within the State of California and that she had been and was concealing herself to avoid the service of summons. According to the *Salinas* case (page 256), a "collateral" attack on the judgment in order to defeat such jurisdictional recitals must affirmatively show that such recitals were solely based upon the deficient affidavit and that at the time of the entry of the judgment it did not appear to the court from other sources that due service had been had. In other

words, absolute verity must be accorded to the jurisdictional recitals even if documents which are part of the judgment roll are defective unless it has been shown affirmatively that the recitals were solely based on faulty statements in such documents.

The rules of California law heretofore discussed were restated in the case of *Kaufmann v. California Mining Syndicate* (1940), 16 Cal. (2d) 90, where the court, citing *Rue v. Quinn* and other cases, reiterated the distinction as to the examination of affidavits upon "direct" and "collateral" attack and on page 92 stated that the authorities cited by the appellants in that case did not support their position, because such authorities involved direct attacks rather than collateral attacks upon judgments. In defining what makes a judgment void on its face the court stated that the trial court's findings as to the validity of the service of process are binding if it does not *affirmatively* appear that these findings were based solely upon any particular document or documents relating to service of summons. Where such exclusive reliance on a particular document does not appear as a matter of record "the presumptions in favor of the validity of the judgment make said findings conclusive upon collateral attack even though there may have been defects in some of the documents constituting part of the judgment roll and relating to the service of summons" (page 93).

It will be noted from these decisions that petitioner is in error in assuming that a judgment under California law is void on its face and an absolute nullity where a defect in the proof required for publication

of service is apparent from an examination of any document constituting part of the judgment roll (see page 9 of the petition and page 23 of the brief and support thereof).

Since the California law relating to the limitations of a collateral attack on a judgment is settled, there is no need for any discussion of two factors referred to in the decision of the Circuit Court of Appeals, to wit: that the affidavit for publication in the instant case contained a statement which was not based on hearsay, but on the affiant's own knowledge and was entirely sufficient to support the court's findings, and that the affidavit likewise referred to the return of the United States Marshal consisting of a certification by three deputy marshals that on a certain day, different in each case, each of them received the summons and that after diligent search he was unable to find the defendant Grace Appleton McKey. The cases holding that the marshal's or sheriff's certificate is admissible evidence for an order of publication of service are collected on pages 22 et seq. of our reply brief in the Circuit Court of Appeals.

We are unable to ascertain whether petitioner in this court urges the point on which she sought to obtain a rehearing in the Appellate Court, namely that the affiant had stated on information and belief the uncontested fact that defendant had not filed a certificate of residence as provided for in Section 1163 of the Civil Code of California in the City and County of San Francisco. This point is not raised in the petition and reference to it is made only in the state-

ment of facts on page 15 of the brief in support of the petition. Since this reference is insufficient to impeach the judgment as to this point, we only refer as a matter of precaution to the argument contained on pages 13 et seq. of our reply brief to the petition for a rehearing in the Circuit Court of Appeals.

III.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS BASED ON THE ALTERNATIVE GROUND THAT UNDER FEDERAL PRECEDENT THE FEDERAL JUDGMENT INVOLVED IN THIS CASE IS NOT VOID AND SUBJECT TO COLLATERAL ATTACK. THIS GROUND FOR THE DECISION IS NOT ATTACKED BY THE PETITIONER.

The federal law contains no provision on publication of service in a case like this and, therefore, the California law is applicable as to the manner how service by publication can be made. However, the question of whether this judgment of a United States District Court is void because of defects in the service of summons effected under California law, is within the province of the federal law.

Bronson v. Schulten, 104 U.S. 410;
United States v. Mayer, 235 U.S. 55.

The Circuit Court of Appeals has, therefore, first examined whether the affidavit for publication of summons was sufficient to effect service so that the court acquired jurisdiction under California law. Since the court held that the service was sufficient to establish the court's jurisdiction under California law, the decision could have been based on this sole

ground. The court, however, based its decision also on the alternative ground, as did the United States Supreme Court in *Thompson v. Thompson,* supra, that even a defect in the mode of service fatal under local law would not have made the judgment a nullity under federal law.

Thompson v. Thompson, 226 U.S. 551, 556;
Pennoyer v. Neff, 95 U.S. 714;
Marx v. Ebner, 180 U.S. 314;
Cohen v. Portland Lodge No. 142, 9 Cir., 152 Fed. 357.

Nowhere does the petition seek review of this alternative ground for the Circuit Court of Appeals' decision which, therefore, is not within the scope of the review sought from this court. Since the alternative ground is sufficient to support the decision of the Circuit Court of Appeals, petitioner's attack on the court's holding on California law is futile, because petitioner could not succeed even if her contentions on the California law relating to service by publication were correct.

CONCLUSION.

We respectfully submit that the Circuit Court of Appeals was correct in holding that hearsay features contained in an affidavit for publication of service do not render a judgment void and subject to collateral attack under California law, and that even if such affidavit were fatally defective under local law a federal judgment based on publication of service would

not be a nullity because of defects in the mode of proof upon which the trial court based its finding of due service.

Dated, San Francisco, California,
February 16, 1944.

JOHN W. DINKELSPIEL,
Attorney for Respondents.

DINKELSPIEL & DINKELSPIEL,
Of Counsel.